PP v. NGUYEN THI HUONG

HIGH COURT MALAYA, SHAH ALAM
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 41-H-72-03-2014]
10 OCTOBER 2014

CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Accused charged for smuggling of trophies of wild animals – Adequacy of sentence – Whether Sessions Court accorded sufficient consideration to public interest – Whether a deterrent sentence was necessary*

The respondent, a Vietnamese national was charged under four separate charges for the act of smuggling of trophies of wild animals protected under the Wildlife Conservation Act 2010. The respondent pleaded guilty to all four charges and was sentenced to (i) six months' imprisonment from the date of arrest for the first charge; (ii) three months' imprisonment from date of arrest and fine of RM20,000 in default two months' imprisonment for the second charge; (iii) nine months' imprisonment from the date of arrest for the third charge; and (iv) nine months' imprisonment from the date of arrest and fine of RM30,000 in default three months' imprisonment for the fourth charge. Dissatisfied with the inadequacy of the sentences passed by the Sessions Court, the prosecution appealed.

Held (allowing appeal; substituting sentences imposed):

(1) The Sessions Court did not accord sufficient consideration to the element of public interest in imposing the sentences against the respondent. It is the bounden duty of the court to arrest the notion that this country will tolerate illegal wildlife smuggling and to ensure that the reputation of the country as a haven for illegal wildlife smuggling is eradicated. The fact that the respondent pleaded guilty and was a first offender must be held subordinate to the dictates of public interest. The sentences imposed by the Sessions Court were manifestly inadequate and justified the interference by the court. (para 16)

Case(s) referred to:
Adam Atan v. PP [2009] 1 CLJ 33 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Tan Sri Abdul Rahim Mohd Noor v. PP [2001] 4 CLJ 9 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 56
Wildlife Conservation Act 2010, ss. 60(1)(b), 65, 68(1)(b), 71

For the prosecution - Suloshani Vijendran; DPP
For the respondent - Unrepresented

[Appeal from Sessions Court, Sepang; Cases No: 83-74-02-2014 & 83-75-02-2014]

Reported by Lyana Shohaimay

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JUDGMENT

Collin Lawrence Sequerah JC:

[1] The respondent is a Vietnamese national. She was charged at the Sessions Court at Sepang for offences under the Wildlife Conservation Act 2010 (Act 716).

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The Charges Against The Respondent

(Translated from Bahasa Malaysia)

[2] The respondent in Criminal Appeal No: 41H-72-03-2014 was charged as follows:

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(i) first charge

That you on 29.1.2014 at around 5.00am at the baggage inspection section at LCCT-KLIA, in the district of Sepang, in the state of Selangor Darul Ehsan, did export one (1) trophy water monitor lizard of the genus

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(Varanus salvator) without a licence and whereas the said animal is a wholly protected wildlife species under the First Schedule, Wildlife Conservation Act 2010 (Act 716). You have thereby committed an offence under section 60(1)(b) of the Wildlife Conservation Act 2010 (Act 716) and punishable under the same section and Act.

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Prescribed penalty for conviction under section 60(1)(b): liable to a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding two years or to both.

(ii) second charge

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That you on 29.1.2014 at around 5.00am at the baggage inspection section at LCCT-KLIA, in the district of Sepang, in the state of Selangor Darul Ehsan, did export one (1) trophy water monitor lizard of the genus (Varanus salvator) without a licence and whereas the said animal is a wholly protected wildlife species under the First Schedule, Wildlife Conservation Act 2010 (Act 716). You have thereby committed an offence under section 65 of the Wildlife Conservation Act 2010 (Act 716) and

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punishable under the same section and Act.

Prescribed penalty for conviction under section 65: liable to a fine not less than twenty thousand ringgit and not more than fifty thousand ringgit and imprisonment for a term not exceeding one year.

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(iii) third charge

That you on 29.1.2014 at around 5.00am at the baggage inspection section at LCCT-KLIA, in the district of Sepang, in the state of Selangor Darul Ehsan, did keep five (5) trophy monitor lizards of the genus (Varanus nebulosus) without a special permit and whereas the said animal is a wholly protected wildlife species under the Second Schedule, Wildlife

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Conservation Act 2010 (Act 716). You have thereby committed an offence under section 68(1)(b) of the Wildlife Conservation Act 2010 (Act 716) and punishable under the same section and Act.

Prescribed penalty for conviction under section 68(1)(b): liable to a fine not exceeding one hundred thousand ringgit and to imprisonment for a term not exceeding three years or to both.

(iv) fourth charge

That you on 29.1.2014 at around 5.00am at the baggage inspection section at LCCT-KLIA, in the district of Sepang, in the state of Selangor Darul Ehsan, did export five (5) trophy monitor lizards of the genus (Varanus nebulosus) without a special permit and whereas the said animal is a wholly protected wildlife species under the Second Schedule, Wildlife Conservation Act 2010 (Act 716). You have thereby committed an offence under section 71 of the Wildlife Conservation Act 2010 (Act 716) and punishable under the same section and Act.

Prescribed penalty for conviction under section 71: liable to a fine of not less than thirty thousand ringgit and not more than one hundred thousand ringgit and to imprisonment for a term not exceeding three years.

[3] The respondent pleaded guilty to all the charges and was convicted and sentenced accordingly.

[4] The respondent was sentenced to:

(i) first charge: six months' imprisonment from date of arrest;

(ii) second charge: three months' imprisonment from date of arrest and fine of RM20,000 in default two months imprisonment;

(iii) third charge: nine months' imprisonment from date of arrest; and

(iv) fourth charge: nine months' imprisonment from date of arrest and fine of RM30,000 in default three months' imprisonment.

The prosecution being dissatisfied with the sentences imposed now appeals against the inadequacy of the sentences.

Principles Regarding Appellate Interference Of Sentence

[5] The principles regarding appellate interference of sentences imposed have been set out in the case of *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193 as follows:

It is of utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256.

[6] In the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102 referred to above it was held as follows:

> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in the exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter sentence merely because it might have passed a different sentence.

[7] In the case of *Adam Atan v. PP* [2009] 1 CLJ 33, it was decided:

> In an appeal against sentence, the initial function of this court is one of review only. The fact that each of us sitting separately or together would have imposed a lesser sentence is irrelevant. The appellant must satisfy this court that the sentencing court has either erred in principle or imposed a sentence that is manifestly excessive. We find it unnecessary to cite any authority in support of this well established principle.

[8] As far as the principles relevant to sentencing are concerned the case of *Tan Sri Abdul Rahim Mohd Noor v. PP* [2001] 4 CLJ 9; [2001] 3 AMR 3253; [2001] 3 MLJ held:

> It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be the uppermost consideration.

[9] In the case of *PP v. Loo Choon Fatt (supra)* it was held:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgement of Hilbery J in *Rex v. Kenneth John Ball* 35 Cr App R 164 as follows:
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> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life.

Public Interest

[10] It is therefore clear that one of the foremost considerations in sentencing policy is that of public interest. But what is public interest? *Stroud's Judicial Dictionary* defines public interest as: "*A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of community have a pecuniary interest or some interest by which their legal rights or liabilities are affected*." So whose rights or liabilities can be said to be affected here? I do not think that there can be much argument that it would be in the public interest to ensure the protection of certain species of wildlife. It is also in keeping with the overall concept of public interest that such rights of liabilities as are affected can be gleaned from a particular Act that has been amended in order to reflect the intended public interest. In the instant case that Act is the Wildlife Conservation Act 2010 ('Act 716'). This Act replaced the Wildlife Preservation Act 1972 ('Act 76'). One of the main aims in replacing Act 76 with Act 716 was because the punishment for offences under Act 76 prescribed disproportionately lower sentences for offences committed.

Reference To Parliamentary Debates (Hansard)

[11] The policy reasons behind the amendment to the said Act can be gathered from the reference to the official Parliamentary debates or the Penyata Rasmi Parlimen Dewan Rakyat (Hansard) dated 12 July 2010 Second and Third Reading where the then Right Honourable Minister for Natural Resources and Environment, YB Dato' Douglas Uggah Embas said in Bahasa Malaysia:

> ... di antara kelemahan akta yang sedia ada adalah denda yang terlalu rendah untuk membanteras jenayah berkaitan hidupan liar. Bagi pandangan orang ramai, denda ini bersifat deterent dengan izin. Ia didapati tidak setimpal dengan nilai komersial dan estetik hidupan liar yang dilindungi di bawah akta tersebut. Sebagai contoh, penalty maksimum bagi kesalahan membunuh seekor harimau liar di bawah akta sedia ada adalah RM15,000 atau penjara tidak melebihi lima tahun sahaja kalau dibandingkan dengan nilai komersial yang boleh menjangkau RM200,000. Di bawah rang undang-undang ini, kesalahan yang sama mengenakan denda minimum sebanyak RM100,000 dan maksimum RM500,000 dan penjara mandatori tidak melebihi lima tahun. Dalam mengambilkira keperluan pencegahan melalui penalti bersifat deterrent dengan izin, rang undang-undang ini telah memasukkan elemen penjara mandatori bagi kesalahan demikian terutama bagi melindungi species hidupan liar yang sangat terancam. Hukuman dan denda yang dicadangkan dalam rang undang-undang ini menunjukkan komitment kerajaan yang tinggi dalam menangani aktiviti jenayah hidupan liar ke arah membaiki imej negative negara yang dilabel sebagai hab kepada penyeludupan perdagangan haram hidupan liar antarabangsa ...

[12] He went further on to say:

> Di samping itu, akta ini kelak akan memantapkan lagi usaha kerajaan dalam membasmi aktiviti jenayah hidupan liar dan mengikis pelabelan Malaysia sebagai hab penyeludupan dan perdagangan haram hidupan liar antarabangsa demi menjamin kewujudan species-species tersebut sebagai warisan negara demi generasi yang akan datang.

[13] From a distillation of what was said by the Right Honourable Minister above, the previous Act had proved inadequate in addressing the issues regarding the conservation of wildlife. One of the main reasons given was the manifest inadequacy of the punishment imposed for offences under the old Act in comparison with the commercial and aesthetic value of the protected species of wildlife concerned. It was also felt that there was a necessity to impose a punishment of mandatory imprisonment term as a means of deterrence from this sort of crime. This was felt necessary in the light of the negative image of the nation in being labelled as the hub for international wildlife smuggling. It was also felt necessary to ensure the preservation of such protected species for posterity. The policy reasons underlying the amendment to the Act is thus clear. It was to address the rampancy with which this crime was being committed and to also prevent the progressive extinction of such species of such wildlife protected according to the schedules in the Act.

[14] The court will therefore be failing in its duty, if a strong message was not sent out that such crimes would not merely result in a 'slap on the wrist' but with severe punishment in keeping with the aims and objectives of Parliamentary intention in amending such Act. A mode of sentence that would result in a deterrence to would be offenders was therefore justified under the circumstances.

[15] This court is further entitled to take judicial notice under s. 56 Evidence Act 1950 ('Act 56') from news articles and the press in general as to the rampancy of such offences in the country. As a matter of fact, it was as recent as the 28th Sultan Azlan Shah Law Lectures held on 9 October 2014 that the invited speaker, Lord Carnwarth of Notting Hill, a Justice of the United Kingdom Supreme Court, in his talk on Environmental Law in a Global Society made mention of Malaysia as being listed as one of the top 12 countries in the world for illegal wildlife smuggling. This observation does not augur well for the image of the nation. This court is entitled to take such matters into account in assessing the adequacy of sentence passed for such an offence.

Decision Of The Court

[16] This court therefore finds that the Sessions Court did not accord sufficient consideration to the element of public interest in imposing the sentences against the respondent. It is the bounden duty of this court to arrest the notion that this country will tolerate illegal wildlife smuggling. It is also

the duty of this court to ensure the eradication of the reputation of this country as a haven and a hub for illegal wildlife smuggling. It is the view therefore of this court that the personal interests of the respondent in pleading guilty and the fact that she was a first offender must be held to be subordinate to the dictates of the public interest in ensuring that such criminal activities be put to a stop. This court also finds that given the circumstances, the sentences imposed by the Sessions Court were manifestly inadequate and in accordance with established case law as referred to above is justified in interfering with the sentences imposed by the Sessions Court.

[17] This court therefore allows the appeal by the prosecution and sets aside the sentences imposed by the Sessions Court and substitutes it with the following:

(i) first charge

12 months' imprisonment from date of arrest.

(ii) second charge

Six months' imprisonment from date of arrest and fine of RM40,000 in default four months' imprisonment.

(iii) third charge

18 months' imprisonment from date of arrest.

(iv) fourth charge

18 months' imprisonment from date of arrest and fine of RM50,000 in default five months' imprisonment.

All sentences to run concurrently.